IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1347 of 2005
With
CRIMINAL APPEAL No. 2025 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VIJAYSINH NATVARSINH VAGHELA - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MR HD CHUDASAMA for Appellant(s) : 1 - 3.
MR KT DAVE, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 02/05/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

Being aggrieved by the judgment and order dated 9.5.2005 passed by the learned Addl. Sessions Judge, Fast Track Court No. 2, Gandhinagar, in Sessions Case No. 127/04, Criminal Appeal No. 1347/05 has been filed by the accused-convicts. By virtue of the judgment and order, the appellants have been convicted of the offences charged against them under the provisions of sec. 307 read with sec. 34 of the Indian Penal Code and have been sentenced to undergo Rigorous Imprisonment for 3 years and a fine of Rs. 2000/-, in default of payment of fine, Simple Imprisonment for 2 months. They have been also convicted of the offence punishable under sec. 498(A) r/w sec. 114 of the IPC and have been sentenced to undergo RI for 2 years and a fine of Rs. 1,000/-, in default of payment of fine, SI for 2 months. The accused have also been convicted of the offence punishable under sec. 3 & 7 of the Dowry Prohibition Act, 1961. All substantive sentences have been ordered to run concurrently.

2. The State has also been aggrieved by the aforesaid judgment and order passed by the learned Addl. Sessions Judge and, therefore, Criminal Appeal No. 2025/05 has been filed by the State praying that the sentences imposed upon the convicts be enhanced.

3. As aforesaid both the appeals arise from same Sessions Case No. 127/04, at the request of the learned advocates, both the appeals have been heard

and decided together.

4. The case of the prosecution before the Sessions Court, in a nutshell, was as under:

4.1 Vinaba, wife of Vijaysinh Natvarsinh Vaghela, PW No. 2 (Ex. 18) (hereinafter referred to as 'the complainant') filed an FIR on 15.6.2004 before the Dy. Superintendent of Police, Gandhinagar Division, Gandhinagar, to the effect that her marriage with Vijaysinh took place before about 7 years in a mass marriage (where marriage of couples belonging to the same caste/community are held in large groups). She had no issue and was staying with her husband at Lekawada. She had a happy married life for about 2 years from the date of her marriage, but thereafter her husband Vijaysinh Vaghela, appellant No. 1, and her mother-in-law Vishnuba Natvarsinh Vaghela, appellant No. 3, started abusing and ill-treating her by beating, etc. as dowry was not given by parents of the complainant. Because of the said reason, she had gone to her parents' place, and, therefore, an FIR was also filed against her husband and her in-law's before about three years but her parents had persuaded her to go back to her in-law's place and thereupon she had gone to her in-law's place and the case filed by the complainant had been compromised.

4.2 As the disputes which she had with her in-laws had been resolved, she had started living with her in-laws. One year before, her father-in-law expired

and, therefore, her mother-in-law, appellant No. 3, used to tell her that she had got her father-in-law killed by performing some black magic. Again, she was asked to bring money from her parents and thereby caused mental and physical torture to her. So as not to hurt them, she did not tell all these facts to her parents.

4.3 Ten days before filing the FIR, her husband Vijaysinh, appellant No. 1, had asked her to bring Rs. 25,000/- from her parents so as to enable him to buy a motorbike, but as financial condition of her father was not good, she could not manage to get Rs. 25,000/- and, therefore, her husband had beaten her and her mother-in-law as well as her husband's brother Harshadsinh Vaghela, appellant No. 2, had told her that her father was a beggar and as he was unable to make any payment, she was married off to appellant no. 1 in mass marriage.

4.4 On 15.6.2004 around 4 a.m., when she was sleeping at the residence of her in-laws on a cot, appellant No. 1, with the help of appellant no. 3, caught her and after covering her mouth with his hands, she was dragged to an adjoining house, where hay was being stacked, and they forcefully tried to put poison used for killing rats in her mouth. She then vomited. Thereafter, appellants nos. 1 and 3 locked her in that room and left. Again around 10-11 a.m. all the appellants came to the said house and upon seeing her alive, Harshadsinh, appellant No. 2,

caught her legs and appellant no. 2 held her from head and appellant no. 3 caught her hair and appellant no. 1 brought a bottle containing phenyl, which was poured into her mouth and, therefore, she again started vomiting. Thereafter, all the 3 appellants left the place. Thereafter, her father as well as brother came to the place and she was taken to Civil Hospital, Gandhinagar where she was admitted as an indoor patient. At the time of making the statement, she was fully conscious.

4.5 In the aforesaid circumstances, she made a grievance that only because of demand for dowry she was given physical as well as mental torture by the appellants and an effort was made by them to murder her.

5. In the course of trial, the Sessions Court had examined the following main prosecution witnesses:

(1)Dr. Kalpesh Shah, Medical Officer, PW No. 1 (Ex. 12)
(2)Vinaba, Complainant, PW No. 2 (Ex. 18)
(3)Bakabhai Gopalbhai, PW No. 3 (Ex. 23)
(4)Chhatrisinh Virsinh, PW No. 4 (Ex. 24)
(5)Ratansinh Madhusinh, PW No. 5 (Ex. 25)
(6)Virsinh Madhusinh, PW No. 6 (Ex. 26)
(7)Amarsinh Magansinh, PW No. 7 (Ex. 27)
(8)Jaguji, panch witness, PW No. 8 (Ex. 29)
(9)Nagarji Bababhai, PW No. 9 (Ex. 30)
(10)Sukhdevsinh Sardarsinh, Investigating Officer,

PW No. 10 (Ex. 30)

6. The following important documents had been considered during the trial:

(1)Complaint (Ex. 20)

(2)Panchnama of scene of offence (Ex. 28)

(3)Panchnama of clothes (Ex. 31)

(4)Medical certificate of the complainant (Ex. 13)

(5)Report of FSL (Ex. 39)

(6)Biological report (Ex. 41)

(7)Case papers of Civil Hospital (Ex. 14)

(8)Compromise Deed (Ex. 22)

7. In the course of the trial, the complainant, PW No. 2 (Ex. 18), was examined. She has stated that she was staying at Lekawada with the appellants and very often appellant No. 3, used to torture her as she had not brought dowry from her parents. In the circumstances, she had to leave her in-law's place and stay with her parents, but her father had made an effort to see that the dispute between the complainant and her in-laws is compromised so as to see that she leads a happy life. A settlement had also been arrived at, which had been reduced to writing on a stamp paper of Rs. 50, and the same had been duly notarised (Ex. 22). Though financial condition of her father was not good, appellant No. 1 had demanded Rs. 25,000/- for buying a motorbike, which her father could not give and, therefore, on 15.6.2004 at 4 a.m. she was dragged to an adjoining house, where hay was being stacked, and poison used

for killing rats had been poured into her mouth. After pouring the said substance, they locked her in a room, where she had started vomiting. Again, between 10 & 11 a.m. all the appellants went to the room, where the complainant was lying, and as the complainant was still found alive, another effort was made to pour phenyl in her mouth. Appellant No. 1 had poured phenyl in her mouth while appellants Nos. 2 and 3 held the complainant. Again she started vomiting and the appellants again locked her in the said room. Subsequently, when parents and brother of the complainant were informed about the said incident, they came to Lekawada and the complainant had been taken to the Civil Hospital for treatment. She was in the hospital as an indoor patient for 3 days.

8. The complainant could withstand a lengthy cross-examination. The thing which her cross-examination reveals is that because of presence of the appellants and threats given by them, the complainant could not shout for help. She was practically unconscious and at the time when she gained consciousness, she found that she was being taken in a Maruti car. However, she could not recognize the person, who was driving the car, and upon reaching the hospital, she had vomited, but subsequently, at the time of filing her FIR, she had gained complete consciousness. She was also completely conscious when the doctor at the Civil Hospital was treating her.

8.1 The prosecution also examined father of the complainant, Virsinh, PW No. 6 (Ex. 26), who has stated that his daughter, the complainant, was tortured in the past, as he did not give dowry demanded by her in-laws. Because of the said torture, he had also filed a complaint in the past, but ultimately a compromise deed (Ex. 22) had been entered into so as to see that his daugter lives peacefully. After the compromise deed was entered into, for some time at Lekawada, his daughter and appellant No. 1 were staying separately and they were quite happy, but subsequently all the appellants and the complainant had started staying together and thereafter appellant No. 1 had demanded Rs. 25,000/- from the complainant to purchase a motorbike.

8.2 He has thereafter submitted that on 15.6.2004 around 3 p.m., somebody had telephoned from Lekawada and informed him that his daughter, the complainant, was sick and, therefore, he should immediately rush to Lekawada. In the circumstances, he went to Dhanap Bus Stand, where his son, Chhatrsinh, PW No. 4 (Ex. 24) was waiting with his rickshaw. He therefore proceeded towards Lekawada in the rickshaw of his son with his younger brother and his wife. While they reached Chiloda, it started raining heavily and, therefore, it was not possible to proceed further in the rickshaw and, therefore, near clinic of Dr. Patel, they saw a Maruti car and driver of Maruti car Thakorebhai. They requested Thakorebhai to take them to Lekawada. In the circumstances, they all proceeded

to Lekawada and upon reaching the residence of the complainant's in-laws, the appellants were found and they were asked as to where the complainant was. The appellants thereupon informed him that the complainant was in the adjoining house. The door of the room was closed. Upon opening the door it was found that the complainant was almost unconscious and it appeared that she had vomited and, therefore, she was lifted and taken to the Civil Hospital, Gandhinagar, in the Maruti car. On the way to Gandhinagar, the complainant had gained consciousness and thereupon she was asked as to what had happened. She stated that she was given medicine (the word 'medicine' in vernacular language was used for poison). She stated that she was forcefully given the 'medicine'. She described as to how the appellants caught hold of her and rat poison as well as phenyl were poured in her mouth. Upon reaching the Civil Hospital, Gandhinagar, the complainant was admitted as an indoor patient and an FIR was also filed. He has specifically stated that, for the purpose of getting dowry from him, his daughter was harassed and tortured.

8.3 In the cross-examination it has been stated by him that he was a retired Police Head Constable and in the past a maintenance application was filed by the complainant. It has been further stated by him that his another daughter, i.e., sister of the complainant, was also given in marriage to a resident of Lekawada and he admitted that no dowry was asked

for at the time of marriage, but subsequently there was a demand for dowry. He has also stated that except the appellants no other person was there at the residence of the complainant and he had seen some substance coming out from the mouth of his daughter at the time when they had seen her in a closed room.

8.4 In the course of the trial, brother of the complainant, Chhatrsinh, PW No. 4 (Ex.24) was also examined and he has also said the same version, which has been narrated by the father of the complainant, namely, Virsinh, PW No. 6 (Ex. 26).

9. So far as the medical evidence is concerned, Dr. Kalpesh Shah, PW No. 1 (Ex. 12) was examined by the prosecution. Dr. Kalpesh Shah, PW No. 1 (Ex. 12) has stated in his chief that he was in charge when the complainant was brought to the Civil Hospital, Gandhinagar, on 15.6.2004 at 4.45 p.m. He had examined her and had taken the case history to the effect that at 4'o clock in the morning she had consumed poison meant for killing rats and on the same day at 11 a.m., she had also consumed phenyl. It was stated by her that she had to take the aforesaid substances because they were forcefully administered to her by her in-laws. When she was admitted to the hospital, she was not completely conscious. Poisonous substance from the stomach had been taken out by Gastric lavage and the contents taken out from the stomach had been forwarded to FSL. He has also stated that when such poisonous

substances are given to someone, if prompt medical treatment is not given, the person consuming such substances can die.

9.1 From the case papers prepared by the doctor, it is clear that because of force used by her in-laws the complainant had consumed poison at 4 a.m. and phenyl around 11 a.m. on 15.6.2004.

9.2 Important medical evidence showing that poisonous substance had been administered to the complainant can be seen from Ex. 39, the report received from FSL. Upon perusal of Ex. 39-40, it can be seen that the fluid, which had come out in vomit, contained a chemical poison, named, aluminum phosphide.

9.3 Dy. Superintendent of Police, Sukhdevsinh Chudasma, PW No. 10 (Ex. 33) has also been examined by the Sessions Court, who has given details with regard to the FIR which was given to him by the complainant. He has also stated that a panchnama was prepared and from the place where the offence was committed, earth containing vomited substance was also collected and was sent to the FSL. He has also referred to the report of the FSL, which reveals that the earth containing substance of vomit contained aluminium phosphide.

9.4 Panch witnesses were also examined, who have substantiated the case of the prosecution.

10. After considering the entire evidence, the Sessions Court has come to the conclusion that the offences alleged against the appellants have been committed by them and therefore the appellants have been convicted and sentenced to imprisonment as stated hereinabove.

11. Learned advocate Shri Chudasma has appeared for the appellants, whereas learned APP Shri K.T. Dave has appeared for the State.

11.1 While arguing for the appellants for their acquittal, learned advocate Shri Chudasma has forcefully submitted that the learned Addl. Sessions Judge has not properly appreciated the evidence and has committed several errors and as a result thereof, the order of conviction has been passed. According to him, for the reasons stated hereinbelow, the order of conviction cannot be sustained and deserves to be quashed and set aside.

11.2 It has been submitted by him that though the complainant has stated that phenyl was poured into her mouth, no trace of phenyl was found from the substance she vomited or from the earth which was sent to FSL for examination.

11.3 According to him, in the compromise deed (Ex. 22) not a word has been said with regard to demand of dowry and, therefore, it cannot be believed

that because of demand of dowry, the complainant had been ill-treated by any of the appellants.

11.4 He has further submitted that no external injury was found on the body of the complainant and, therefore, the version given by the complainant that poisonous substances was poured into her mouth forcefully by the appellants and she was dragged from her cot when she was sleeping, to an adjoining house – the place where hay was stacked, cannot be believed. He has thereafter submitted that the complainant, not being a minor child, could have shouted for help, but she did not shout for help at all and that shows that the version given by her is not true.

11.5 The learned advocate has relied upon the following judgments to substantiate his submissions:

(1)Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., 2002(2) Crimes 36
(2)Hathi @ Mangalsinh Ramdayalji v. State of Gujarat, 1993(2) GLH 673
(3)Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170

He has, therefore, submitted that the order of conviction deserves to be quashed and set aside.

12. On the other hand, learned APP Shri KT Dave has submitted that the Sessions Court has rightly

appreciated the evidence and in view of the fact that poisonous substance, i.e., aluminium phosphide, was found from the scene of offence as well as from the substance vomited by the complainant, by no stretch of imagination it can be said that the order of conviction is bad. He has taken us through important evidence, which was adduced before the Sessions Court and has submitted that the conclusions arrived at by the Sessions Court are absolutely correct and there is no reason to quash and set aside the order of conviction.

12.1 The learned APP has further submitted that looking to the gravity of the offences committed by the appellants, the quantum of punishment imposed upon them is much less. He has submitted that looking to the fact that such offences against women are increasing day by day, this court should take a stricter view and enhance the punishment. According to him, it was good luck of the complainant that her parents and brother came at the right time and she was shifted to the Civil Hospital, Gandhinagar, and because of prompt treatment given to her, her life could be saved. Otherwise, she would have surely died because of the poison, which was poured into her mouth by the appellants. He has, therefore, submitted that the punishment should be enhanced so as to set an example and to have a deterrent effect on others indulging in such criminal acts in the society.

13. We have heard the learned advocates at length and have carefully gone through the evidence adduced before the Sessions Court. Upon perusal of the evidence, we are of the view that the Sessions Court is absolutely right when it has come to the conclusion that the appellants are guilty of the offences alleged against them.

13.1 Simply because no traces of phenyl were found in the substance vomited by the complainant, it cannot be said that the appellants deserve acquittal as submitted by learned advocate Shri Chudasma. It is true that only aluminium phosphide was found by the FSL as revealed from Ex. 39. However, one cannot rule out the possibility of phenyl being in less quantity, might have been thrown out earlier while vomiting. The phenyl might be in such a small quantity that it could not have been either traced by the FSL or there might not be any phenyl in her body when vomitted substance was taken for medical examination in the Civil Hospital, Gandhinagar. Presence of aluminium phosphide is sufficient to come to the conclusion that poisonous substance was administered to the complainant and it can be very well inferred that this was nothing but an attempt to commit murder of the complainant by the appellants as they could not get Rs. 25,000/- from the parents of the complainant by way of dowry. Thus, absence of traces of phenyl from the substance vomited by the complainant can never result into acquittal of the appellants especially when other poisonous substance, namely,

aluminium phosphide, has been found from the body of the complainant. It is not in dispute that alumimium phosphide is a poisonous substance, which, according to the medical opinion, is such that its consumption can result into death, if prompt medical treatment is not given to the person consuming the same.

13.2 The submission with regard to not referring to demand of dowry in the compromise deed (Ex. 22) would also not help the appellants. If one carefully looks at the compromise deed (Ex. 22), it is clear that there is a reference to certain disputes which had arisen between the complainant and her in-laws. It is also on record that an application for maintenance was filed by the complainant and some other proceedings were also initiated against the appellants. The language used in the compromise deed denotes that there were disputes, but the nature of dispute has not been referred to at all, possibly because the matter was being settled and, therefore, they never wanted to refer to any of the disputes which had arisen among them. It is however an admitted fact that there were several disputes, which the complainant had with the appellants and, therefore, the said compromise deed had to be entered into.

13.3 The submission of learned advocate Shri Chudasma that if the complainant had been dragged to another room or to an adjoining house, there should have been some external injury on the body of the

complainant, and as no marks of injury had been found on the body of the complainant, the entire case of the prosecution is got-up, cannot be accepted because, whether the complainant was dragged on a smooth surface or a rough surface is not known. There are all chances that if the surface is smooth and a person is dragged, who is unable to resist, there may not be any injury mark of friction on the body of the person dragged. We, therefore, do not find any substance in the said submission.

13.4 The last submission, which the learned advocate has made, is with regard to the complainant not shouting for help after poison was administered to her. He has submitted that after administration of poison for some time the complainant was locked in a room and at that time she could have shouted for help. The said submission, though appears to be attractive, cannot help the appellants because, possibly, the complainant might not be having sufficiently good state of mind and physical strength so as to shout for help. In fact she lost her consciousness for some time and, therefore, there was no possibility of her shouting for help. As she was given poison, which is used for killing rats, and as she vomited as per evidence adduced before the Sessions Court, it is possible that she might not be having sufficient strength to shout for help and, therefore, we do not find any substance in the said submission.

13.5 There was no reason for the Sessions Court to disbelieve the complainant when she stated that she was administered poison. Medical evidence supports the case of the prosecution because, from the contents taken out from the stomach of the complainant, aluminium phosphide has been found. Moreover, from the earth taken out from the scene of offence where the complainant vomited, which was sent for examination, the prosecution has found traces of aluminium phosphide. Medical evidence corroborated by statement of the complainant and her deposition cannot be brushed aside and, therefore, we do not find any error in the conclusion drawn by the Sessions Court and in the order convicting the appellants for the offences charged against them.

13.6 Relying on the judgment delivered in the case of **Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.,** (supra) and **Hathi @ Mangalsinh Ramdayalji v. State of Gujarat** (supra), the learned advocate appearing for the appellants has submitted that it is always open to the parties to make an application for recall of witnesses. He has prayed that a person from FSL should be recalled and examined so that he can be cross-examined to find out whether aluminium phosphide, which had been consumed by the complainant, was sufficient to kill a person or as to how much quantity of aluminium phosphide is required for the purpose of killing a normal person. In our opinion, no case has been made out for recall of witness. We, therefore, do not agree with the

said submission made by the learned advocate.

13.7 While referring to the judgment delivered in the case of **R.K. Dey v. State of Orissa** (supra), it has been submitted by learned advocate Shri Chudasma that there are settled principles of criminal law and one of them is that the onus lies on the prosecution to prove its case beyond reasonable doubt. It has been submitted by him that in the instant case the prosecution has not established that aluminium phosphide, which had been found from the substance vomited by the complainant, was strong enough to cause death of the complainant. As the said fact has not been established by evidence of any expert in the field of chemicals, it cannot be believed that the said poison would have resulted into death of the complainant. We do not agree with the said submission because Dr. Kalpesh Shah, PW No. 1 (Ex. 12) has already adduced evidence to the effect that if a person is forced to consume rat killing poison containing aluminium phosphide, he/she could die if the person is not given prompt medical treatment. In our opinion, the aforesaid evidence is sufficient to show that the complainant would have died because of consumption of poison containing aluminium phosphide, had she not been taken to the Civil Hospital, Gandhinagar, and prompt medical treatment was not given.

14. For the aforesaid reasons, in our opinion, the judgment and order of conviction passed by the

learned Addl. Sessions Judge, Fast Track Court No. 2, Gandhinagar, in Sessions Case No. 127/04 is just and proper. As the evidence has been properly appreciated by the Sessions Court, we do not find any reason to interfere with the impugned judgment and order. Criminal Appeal No. 1347 of 2005 is, therefore, dismissed.

14.1 Criminal Appeal No. 2025 of 2005 has been filed by the State praying for enhancement of punishment imposed by the Sessions Court on the convicts. Looking to the gravity of offence, in our opinion, the quantum of punishment inflicted upon the convicts is just and proper. Though the learned APP has vehemently argued that cases of dowry deaths and harassment of married women has been on the increase and so as to set an example and to have deterrent effect on persons indulging in such acts in the society, the punishment should be enhanced, in our opinion, the punishment inflicted upon the convicts is just and proper and, therefore, we do not see any reason to enhance the punishment. Criminal Appeal No. 2025 of 2005 is also, therefore, dismissed.

R&P to be returned to the Sessions Court.

(Anil R. Dave, J.)

(K.S. Jhaveri, J.)

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